

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STEKR V. BEECHAM

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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PETER K. STEKR, APPELLANT,

V.

KELLY BEECHAM, FORMERLY KNOWN AS KELLY SHANNON STEKR, APPELLEE.

Filed August 28, 2012. No. A-12-083.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Remanded with directions.

John A. Kinney and Jill M. Mason, of Kinney Law, P.C., L.L.O., for appellant.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellee.

INBODY, Chief Judge, and MOORE, Judge, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

INTRODUCTION

Peter K. Stekr (Peter) sought modification in the district court for Douglas County of his child support obligation owed to Kelly Beecham, formerly known as Kelly Shannon Stekr (Kelly). The court denied Peter's motion to modify, and Peter appealed. This court remanded with directions to prepare a child support worksheet and prepare an order of modification consistent with our memorandum opinion. See *Stekr v. Beecham*, No. A-10-1047, 2011 WL 4635141 (Neb. App. Sept. 27, 2011) (selected for posting to court Web site). In response to the mandate of this court and pursuant to the parties' stipulation, the district court entered an order and attached each party's respective child support worksheet which had been submitted at the time of the modification hearing. Peter has again appealed. Because we find that the district court did not comply with our previous mandate, we remand the cause with directions.

BACKGROUND

The district court entered a decree in 2001, dissolving the parties' marriage. At that time, the court granted Kelly custody of the parties' daughter and ordered Peter to pay child support of \$985.84 per month. In 2007, Peter's child support obligation was increased to \$1,801.51 per month.

In 2010, Peter filed a complaint to modify his child support obligation, alleging that his income had decreased. A hearing on Peter's complaint to modify was held before a district court referee. In our memorandum opinion from Peter's previous appeal, we noted that the evidence at the hearing was as follows:

At the hearing, Peter testified that in April 2010, he began working for a bank where he earns \$60,000 per year. Prior to his job at the bank, Peter was employed as a bond trader from 2005 to February 2010 and was paid substantial commissions. The evidence showed that Peter made \$129,057 in 2007, \$331,354 in 2008, and \$345,689 in 2009. Peter stated that he lost his job as a bond trader through no fault of his own, but because of certain decisions his company made and because of the faltering economy. Peter suggested that based on his current salary of \$60,000, his child support obligation should be \$647.51.

The evidence also showed that Peter formed a corporation which owns a single asset, a home in Colorado worth approximately \$950,000. Peter testified that he has a mortgage on the Colorado property in the amount of \$690,000 and that the monthly mortgage payments are between \$2,400 and \$2,600. Peter testified that he has been using his savings and funds from other investments to pay the mortgage since his income has decreased. Peter testified that the Colorado property is listed for sale and that the asking price is \$799,000. Peter also owns two other homes, one valued between \$450,000 and \$500,000, and the other valued at \$525,000. Peter stated that neither of these two properties has an outstanding mortgage.

Kelly testified that she is not currently employed and has not been employed since their daughter was born in 2000. Kelly presented evidence that Peter is behind on his child support obligation.

Stekr v. Beecham, No. A-10-1047, 2011 WL 4635141 at *1-2 (Neb. App. Sept. 27, 2011) (selected for posting to court Web site).

In his report, the referee recommended that, although under the Nebraska Child Support Guidelines Peter may be eligible for a reduction in his child support, the guidelines not be used in this case because it is "outside the normal financial framework on which the Guidelines are based." The referee stated:

While [Peter] does have reduction in salary[,] he has holding[s] worth almost Two Million Dollars (\$2,000,000) and seem[s] to be will[ing] to spend his savings and borrow monies to protect his financial situation while not protecting his child's current or future financial situation. He is currently delinquent in his support but maintains two pieces of real estate in the Omaha area and one in Colorado. [Peter] should not be granted a reduction on his most important financial obligation, the one to his child[,] while he continues to protect and build his own financial situation. [Peter] testified that he is

currently attempting to sell his Colorado real estate[,] but there is no evidence as to what he intends to do with those proceeds to protect his child's financial situation.

The referee recommended that Peter's complaint for modification be denied.

Peter filed an exception to the referee's report. On October 6, 2010, the district court entered an order overruling Peter's exception. The court stated that after reviewing the evidence, it appeared that there was sufficient evidence to support the referee's findings in light of Peter's significant real estate holdings and his willingness to spend his savings and borrow moneys to protect his financial situation. The district court accepted and adopted the findings and recommendations of the referee.

Peter appealed from this order, alleging that the district court erred in failing to calculate his child support obligation under the child support guidelines and failing to include a child support calculation in its decision.

On appeal, this court determined that by adopting the referee's findings, the district court essentially found that Peter's decrease in income was a material change in circumstances warranting a reduction in child support but that a deviation from the guidelines was justified based on the value of Peter's real estate. *Stekr v. Beecham, supra*. We observed that neither the referee nor the district court attached a child support worksheet to its order as required by Neb. Ct. R. § 4-203 (rev. 2011). *Stekr v. Beecham, supra*. We found that although the court denied Peter's complaint to modify, leaving his child support the same, the court recalculated Peter's obligation based on the evidence presented of his decrease in income and his real estate holdings. *Id.* Accordingly, a worksheet was necessary to show how the court arrived at the same amount of support that Peter had been previously ordered to pay.

This court also observed that the district court's order did not state the amount of child support that Peter would have been required to pay under the guidelines based on his decreased monthly income, something the court was required to do since it found that a deviation from the guidelines was appropriate. *Id.* We noted that in the event of a deviation from the guidelines, the trial court should state the amount of support that would have been required under the guidelines, absent the deviation, and include the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

Because the district court failed to include a worksheet with its order and failed to state the amount of support that would have been required under the guidelines, we were unable to determine the method used by the court to determine Peter's child support obligation. Accordingly, we remanded with directions that the district court prepare the applicable child support worksheet and an order of modification consistent with our memorandum opinion. The mandate issued from this court on November 1, 2011.

On remand, the district court entered an order on January 24, 2012, stating, in its entirety, as follows:

This matter came before the Court on the mandate of the Nebraska Court of Appeals and the Stipulation of the parties. The Court finds that the two (2) child support calculations attached hereto as Exhibit 1 and Exhibit 2 should be considered as the calculations attached to the findings and orders of the Court related to the Complaint to Modify of

[Peter] requesting a reduction to his child support. The document identified as Exhibit 1 is the child support calculation of [Kelly] from the trial, and the document identified as Exhibit 2 is the child support calculation of [Peter] from the trial. The attached calculations were submitted by each of the parties at the time of trial in support of their respective positions.

The stipulation of the parties indicates that exhibits 1 and 2 were the calculations of the respective parties used at the 2010 modification trial. In exhibit 1, Kelly calculated her monthly net income at \$3,727.92 and Peter's at \$16,732.59, resulting in child support due from Peter in the amount of \$1,801.51. We note that exhibit 1 was prepared in 2007 and results in the identical amount of support that Peter was ordered to pay pursuant to the 2007 modification order. At the 2010 hearing before the referee, Kelly confirmed that this was the child support calculation attached to the 2007 modification order. In exhibit 2, Peter calculated Kelly's monthly net income at \$3,881.69 and his own at \$3,608.77, resulting in child support due from Peter in the amount of \$647.51. Peter subsequently perfected the present appeal to this court.

ASSIGNMENTS OF ERROR

Peter asserts that the district court erred by (1) failing to find that a substantial and material change in circumstances occurred justifying a reduction in child support, (2) relying on the fact that he owned real estate in refusing to reduce his child support, (3) failing to use his current income in recalculating child support, (4) failing to retroactively reduce his child support, (5) failing to adjust the percentages for his daycare and uninsured medical expenses, and (6) refusing to use the child support guidelines in calculating his child support.

Peter argues only that the district court erred by refusing to use the guidelines in calculating his child support and by relying on the fact that he owned real estate in refusing to reduce his child support. Near the end of the argument section of his brief, Peter makes references to his other assignments of error, but he does not present arguments in support of them. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

STANDARD OF REVIEW

Modification of child support is entrusted to the discretion of the trial court. *Rutherford v. Rutherford*, 277 Neb. 301, 741 N.W.2d 922 (2009). An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Id.* A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

ANALYSIS

We first consider whether the district court, on remand, complied with our mandate.

Where an appellate court reverses and remands a cause to the district court for a special purpose, on remand, the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate. *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94

(2009). When an appellate court's mandate makes its opinion a part thereof by reference, the lower court should examine the opinion with the mandate to determine the judgment to be entered or the action to be taken thereon. *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

In our previous memorandum opinion, *Stekr v. Beecham*, No. A-10-1047, 2011 WL 4635141 (Neb. App. Sept. 27, 2011) (selected for posting to court Web site), we informed the district court that a child support worksheet was necessary to show how the court arrived at the same amount of child support that Peter had previously been required to pay in 2007. Because we concluded that the district court essentially found that Peter's reduction in income was a material change in circumstances warranting a reduction but further found a deviation was justified, we stated that it was also necessary for the district court to determine the amount of child support Peter would have been required to pay under the guidelines based on his decreased monthly income, and to include the reason for the deviation in the findings portion of the order or complete and file worksheet 5. See *Stekr v. Beecham, supra*. What the district court did was attach the worksheets submitted by each party at the time of trial and stated that the worksheets should be considered as the calculations attached to its previous order denying Peter's request for modification.

We recognize that the district court followed the request of the parties contained in their stipulation in an effort to comply with our previous remand. However, the district court failed to follow the instructions contained in our mandate and memorandum opinion. We are still faced with the same situation as in the previous appeal; namely, we are unable to determine the method used by the district court to determine Peter's current child support obligation. Although the district court attached the two child support calculations supplied by the parties, we do not know which child support calculation has been adopted by the district court as its own determination of child support. Although the district court attached Kelly's 2007 worksheet to the current order, the district court did not explain how it determined that the child support should remain at the same amount as ordered in 2007. In this regard, we note that at no time did the district court find that Peter had not proved the occurrence of a material change in circumstances since the 2007 order. In addition, although Peter's worksheet was attached showing his reduction in income and corresponding reduction in child support, the district court did not specifically find that Peter would be required to pay this amount of child support under the guidelines. Finally, the district court did not include the reason for any deviation from this required child support in the findings portion of the order or complete and file worksheet 5.

While we recognize the difficulty that an additional remand may cause the parties, we are unable to determine how the district court reached its determination that Peter should continue to pay child support in the sum of \$1,801.51 per month. Accordingly, we remand the cause to the district court with directions to prepare a child support worksheet and order which supports its determination of current child support consistent with this opinion.

CONCLUSION

Because the district court failed to comply with our previous mandate, the cause is remanded with directions that the district court prepare an order of modification consistent with this opinion.

REMANDED WITH DIRECTIONS.